

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

TANGER MANAGEMENT, LLC;)
TANGER COLUMBUS, LLC; and)
TANGER HOUSTON, LLC,)
)
Plaintiffs and Counter Defendants,)
)
 v.) CIVIL ACTION NO. 1:20-CV-00874-RP
)
HAGGAR DIRECT, INC., and HAGGAR)
CLOTHING CO.,)
)
Defendants and Counterclaimants.)
)
)

**PLAINTIFFS AND COUNTER DEFENDANTS'
NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiffs and Counter Defendants Tanger Management, LLC, Tanger Columbus, LLC, and Tanger Houston, LLC (collectively “Tanger” or “Plaintiffs”) hereby notify the Court of the following legal authority in support of their pending Motion to Dismiss Counterclaims and Strike Affirmative Defenses (Doc. 16.): the December 3, 2020 Order in *Svap III Riverdale Commons, LLC v. Coon Rapids Gyms, LLC dba Xperience Fitness*, 2020 Minn. Dist. LEXIS 361, No. 02-CV-20-3652 (Minn. Tenth Judicial Dist. 2020) (attached hereto as **Exhibit A.**).

In *Svap*, the landlord sought to evict the tenant, the operator of a fitness center, for nonpayment of rent. *Id.* at *1. The fitness center had been forced to close for several months under the Minnesota governor’s COVID executive orders and then had reopened at 25% capacity pursuant to further executive orders. *Id.* at *2. The tenant argued that the doctrines of impossibility and frustration excused its rent obligation. *Id.* at *8. The court found that Tenant did not prove that it was impossible to pay rent, and that even if it had, the impossibility would have been

subjective rather than objective (*Id.* at *10), therefore the duty to pay rent was not discharged. *Id.* at *14, citing *Powers v. Siats*, 244 Minn. 515, 520, 70 N.W. 2d 344, 348 (1955). The court also held that the defense of frustration was inapplicable because the executive orders did not frustrate the purpose of the lease where the tenant had access to and continued to possess the premises at all times (*Id.* at *8) and the lease contemplated the possibility of closure or restrictions caused by a public authority. *Id.* at *11 and *13, citing *Metro. Sports Facilities Comm'n v. Gen. Mills, Inc.*, 460 N.W. 2d 625, 630 (Minn. Ct. App. 1990, aff'd, 470 N.W. 2d 118 (Minn. 1991)). The court said that "it would be patently unfair to force Landlord to uphold its obligations under the Lease, while excusing Tenant's obligation to pay rent." *Id.* at *12. The landlord was granted summary judgment for eviction.

Dated: January 21, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify by my signature below that a copy of this notice is being served on the following by ECF on this 21st day of January 2021:

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